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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY JESSIE GUTIERREZ,

Defendant and Appellant.

B204022

(Los Angeles County
Super. Ct. No. BA316452)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Affirmed as modified.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillete, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

On August 23, 2007, a jury convicted defendant and appellant Jeffrey Jessie Gutierrez of assault with a deadly weapon (count 1, Pen. Code, § 245, subd. (a)(1));¹ attempted criminal threats (count 2, §§ 422, 664);² and carrying a dirk or dagger (§ 12020, subd. (a)(4)). On October 30, 2007, the trial court sentenced defendant, under the Three Strikes law, to 25 years to life on count 1. The court sentenced defendant to a concurrent 1-year term on count 2 and to a concurrent 25 years to life on count 3. The court also sentenced defendant to consecutive two 5-year terms under section 667, subdivision (a)(1). Defendant was given a total of 275 days of credit, calculated as 248 actual days plus 37 good time/work time days. The court found that defendant was not entitled to credits on the indeterminate portion of his sentence.

The sole issue defendant raises on appeal is the trial court erred in finding that he was not entitled to credits on the indeterminate portion of his sentence. “[P]resentence conduct credits are available to a defendant sentenced to an indeterminate life term under the three strikes law,” and presentence custody credits are not limited under section 2933.1 to 15 percent of actual time if the current felonies are not violent felonies in section 667.5. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 908.) Defendant’s current felonies are not listed in section 667.5. The credits on the indeterminate portion of his sentence therefore should not have been limited.

Under section 4019, “[a] convicted felon is eligible for a one-day credit for performing work and another one-day credit for complying with regulations for every six-day period during which he or she is confined in or committed to a county jail prior to sentencing. . . . If the six-day commitment minimum is met, for every four days spent in actual custody, a term of six days is deemed served.” (*People v. Culp* (2002) 100

¹ All further undesignated statutory references are to the Penal Code.

² The jury acquitted defendant of criminal threats.

Cal.App.4th 1278, 1282-1283, fns. omitted.) Under this formula, defendant should have been awarded 372 days of credit.³

The People do not dispute that defendant is entitled to the additional days of credit. The People's only response is the appeal should be dismissed because defendant failed to comply with section 1237.1, which provides, "No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court." Defendant did not here present the claim first to the superior court. Nonetheless, in the interest of justice and because the miscalculation involves the trial court's misunderstanding of the law rather than a simple mathematical error, we will not dismiss the appeal. We instead order the abstract to be amended to reflect an award of 372 credits.

³ "The proper method of calculating presentence custody credits is to divide by four the number of actual presentence days in custody, discounting any remainder. That whole-number quotient is then multiplied by two to arrive at the number of good/work credits. Those credits are then added to the number of actual presentence days spent in custody, to arrive at the total number of presentence custody credits." (*People v. Culp*, *supra*, 100 Cal.App.4th at p. 1283.)

Defendant had 248 days of actual custody. That number, divided by 4, equals 62. Sixty-two multiplied by two equals 124. One hundred and twenty four plus 248 equals 372. The People do not dispute this calculation.

DISPOSITION

The Clerk of the Superior Court is directed to amend the abstract of judgment to reflect that defendant is entitled to 372 days of presentence conduct credit. The clerk is directed to forward the amended abstract of judgment to the Department of Corrections. The judgment is otherwise affirmed as modified.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.